In the Supreme Court of the United States

OCTOBER TERM, 1949

COLGATE-PALMOLIVE-PEET COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., et al.,
Intervenors,

and

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (C.I.O.),
Intervenors.

No. [redacted] 47

WAREHOUSE UNION LOCAL 6, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (C.I.O.),
Petitioner (Intervenor Below),

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent (Respondent Below),

and

COLGATE-PALMOLIVE-PEET COMPANY,
Respondent (Petitioner Below),

and

INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., et al.,
Respondents (Intervenors Below).

No. [redacted]

BRIEF FOR INTERNATIONAL CHEMICAL WORKERS UNION, AFL, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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(Intervenor Below)

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and

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INTERNATIONAL CHEMICAL WORKERS UNION, A.F.L., et al.,
Respondents (Intervenors Below).

No. 695

BRIEF FOR INTERNATIONAL CHEMICAL WORKERS UNION, AFL, IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The International Chemical Workers Union, AFL, intervenor in the proceedings below, respectfully prays that the petition for certiorari submitted by the Colgate-Palmolive-Peet Company, and the companion petition submitted by Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union, CIO, be denied. Both petitions seek review of a judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case. The judgment in question enforces a decision and order of the National Labor Relations Board.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, though not yet reported, is contained in the Record, pages 990-992. The decision and order of the National Labor Relations Board is reported in 70 N.L.R.B. 1202.

JURISDICTION.

The jurisdiction of this Court is invoked, as intervenors understand, under Section 240(a), Judicial Code, as amended, and Section 10(f) of the National Labor Relations Act, 29 U.S.C.A. 160(f) as amended by the Labor Management Relations Act, 1947. Petitioner, Colgate-Palmolive-Peet Company, also relies upon Rule 35, Paragraph 5(b) of this Court.[1]

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[1]In Petitioner's Brief, page 3, reference is made to Rule 38, Paragraph 5(b). This is, apparently, a printing error.

STATUTES INVOLVED.

The statutes involved are the following:

(1) The National Labor Relations Act, 29 U.S.C.A. 151, et seq., especially 29 U.S.C.A. 157, 158 (1) and (3), 159 (a) and (c), 160 (c).

(2) The Labor Management Relations Act, 1947, 29 U.S.C.A. 151, et seq., especially 29 U.S.C.A. 157, 158 (a) (1), 158 (a) (3), 160 (f).

(3) The Administrative Procedure Act, 5 U.S.C.A., Section 1001 et seq., especially Section 1009 (e).

The important sections are set forth in Appendix "A".

AMPLIFICATION OF PETITIONERS' STATEMENTS OF THE CASE.

In *Matter of Rutland Court Owners*, 44 N.L.R.B. 587, 46 N.L.R.B. 1040, the National Labor Relations Board first denominated as an unfair labor practice the discharge of employees pursuant to a closed shop contract when the employer had knowledge that the incumbent union's requests for discharge were based upon the employees' advocacy of a rival union during representation proceedings.

Since it would manifestly be improper for the employer, on his own initiative, to discharge an employee for engaging in circumspect activities leading to the selection of a bargaining representative, the Board has, counsel submit, properly precluded him from doing, at the instigation or request of another, that which he is forbidden to do directly.

Nevertheless, as the *Rutland Court* doctrine is a restriction upon the closed-shop contract, it has been strictly limited to situations wherein:

(1) the employer, pursuant to a closed shop contract, discharges or refuses to rehire an employee,

(2) at the request of the contracting union when, *to the employer's knowledge,* the contracting union requested the discharge or counseled the refusal to rehire because the employee had engaged in rival union activities,

(3) during a period when it was appropriate for employees to seek a change of bargaining representatives.

Each of these elements has been abundantly, if not overwhelmingly, established by the evidence in the instant proceedings. The fact of discharge by the employer, at the request of the contracting union, is not contested; the refusal of reinstatement to certain employees so discharged is, also, not controverted. That the employees were engaged in activities during a period when it was appropriate to seek a change of bargaining representatives is, apparently, likewise conceded. The petitioners, however, stoutly maintained before the Board and the Circuit Court, and here contend, insufficient evidence was adduced in the proceedings to establish that the company had knowledge of the union's purpose in requesting the discharges. For this reason, and without embarking upon an extensive analysis of the Record, counsel for Intervenor desires to draw the attention of this Court to certain portions of the Record establishing such knowledge. The

portions in question are, in varying degrees, omitted or glossed over in Petitioners' statements of the matter involved in the petitions.

A partial chronology will serve this purpose:

Early 1945: Dissatisfaction with the C.I.O. is developing in the plant. (R.I, 25; R.I, 225-226).

July 20, 1945: Employer's Vice President, B. W. Railey, requests presence of the five plant stewards when the contract was to be extended, because of impending labor troubles and employee unrest (R.I, 188-189, 225-226).

July 28, 1945: Five plant stewards, pursuant to decisions formulated at an earlier meeting, seeking a change of bargaining representative, post on the bulletin boards throughout the plant, a notice of meeting inviting all interested in joining "Employees Welfare Association" to be present at a certain meeting hall on July 30, 1945 (R.I, 69, 27; R.I, 191-192, 255-256).

Superintendent informs Labor Relations Director of the Notice (R.III, 667-668, R.I, 255-256).

July 28 or 29, 1945: One steward and an employee obtain permission from the Superintendent for a plant shutdown of two hours in order that employees may attend the meeting (R.I, 69-70; R.I, 268-269).

July 30, 1945: On the day of the scheduled meeting, C.I.O. agents request discharge of the five stewards leading the anti-C.I.O. organizational drive on the ground that they have been "suspended from membership" in the C.I.O. "pending a trial" (R.I, 27-28; R.III, 668-669, 784-785, R.I, 259, 256).

After a conference between the Superintendent and Vice President (R.II, 522, R.III, 669-670), the Vice President discharges the five stewards (R.I, 70, 29; R.I, 194, 256-257, 288-289).

C.I.O. agents distribute throughout the plant bulletin stating:

ATTENTION

All Warehouse Union Members: An illegal meeting has been called by certain employees of Peet's now under suspension as members of this union for violation of the membership oath, and other illegal acts.

WARNING

Any member of Local 6 who attends such illegal meeting or participates in violation of our constitution, does so at the risk of losing membership and employment.

General Executive Board
Warehouse Union
Local No. 6, I.L.W.U.

(R.I, 70, 31-32; R.I, 256; R.III, 785; R.I, 259).

According to the Vice President the plant was "in a state of turmoil due to the fact of a lot of conversation and visiting, and union people going through the plants, and people couldn't get their work done" (R.I, 36; R.II, 528).

More than 200 of the 313 employees within the bargaining unit attend the scheduled anti-C.I.O. meeting (R.I, 70, 32; R.I, 196, 256). Employees attending unanimously decide to form an independent union, the

"Employees Welfare Association", as an intermediate step until affiliation with an international union can be effected (R.I, 70, 32; R.I, 196, 200-201, 261, 288; R.III, 848; R.I, 259). Four employees are designated committeemen and directed to demand reinstatement of the discharged stewards and, if they should be unable to obtain reinstatement, all employees would cease work in protest (R.I, 70, 33; R.I, 196, 199; R.III, 849; R.I, 259).

Telegrams are sent to the C.I.O. and employer's Vice President by the "Negotiating Committee" of the "Employees Welfare Association" notifying them of the fact that more than 200 employees have severed relations with ILWU-6 as collective bargaining agent (R.I, 70-71, 34; R.I, 257; R.III, 786-787; R.I, 259).

July 31, 1945: The four committeemen request reinstatement of the discharged stewards (R.I, 71; R.I, 257, R.II, 360-361).

C.I.O. agents, committeemen, the Company's Vice President and Superintendent gather in the office of the Vice President (R.I, 35; R.II, 361, 527).

Vice President admits "it became quite apparent as this conversation took place that there was a schism developing in the ranks of the C.I.O." (R.II, 545-546).

During this meeting, C.I.O. agents notify committeemen that suspension notices are being prepared for them (R.I, 71; R.I, 263-264).

Employer receives formal request for discharge of the four committeemen (R.I, 71, 36-37; R.III, 673-675, 846-847).

C.I.O. agents circulate another bulletin in the plant stating that those associating and advocating the cause of the four committeemen would jeopardize "their • • • reputation • • • union standing • • • seniority, and their jobs" (R.I, 71, 37-38; R.III, 789; R.I, 257, 259).

A second anti-C.I.O. meeting is held at noon and attended by a majority of the employees (R.I, 71, 38; R.I, 257). The Vice President of the Petitioner attended the meeting and stated that reinstatement of stewards was impossible (R.I, 72, 38-39; R.I, 257-258; R.II, 529-531).

Employees vote in protest not to return to work and two and one-half day strike of a majority of the employees commences (R.I, 72, 38-39; R.I, 202, 258, 266; R.III; 677, 850-851; R.II, 533).

August 2, 1945: Majority of employees attend third anti-C.I.O. meeting and it is decided to affiliate with the International Chemical Workers' Union, A.F.L., to return to work, and to request an election be conducted by the National Labor Relations Board (R.I, 72, 40; R.I, 258, R. III, 851-852, R.I, 259).

August 2, 1945: Petitioner's Superintendent notifies the four committeemen that, in view of their suspension by the C.I.O., it would be futile for them to return (R.I, 72, 39-40; R.I, 258, 266-268, R.II, 378, R.III, 806-807, R.II, 654-656).

August 8, 1945: The A.F.L., C.I.O., and the Petitioner meet to discuss a petition for change of representa-

tives filed with the N.L.R.B. on August 3, 1945 (R.II, 549-552).

Petitioner's Vice President agreed that, by this date, it was apparent that a campaign for change of representatives was in progress (R.I, 72; R.II, 547).

August 11, 1945: Employee Zulaica reports to foreman, that C.I.O. official warned him active advocacy of A.F.L. would lead to dismissal and that the C.I.O. would not have to have the majority discharged but "can pick some of you out and claim that you were the leaders, and that will scare the rest of them". Employee requests foreman to talk to the Superintendent (R.I, 41; R.II, 305-310).

Employee Zulaica informed in afternoon by Assistant Superintendent "I think all your trouble is because you are wearing those buttons. If you take them off you won't have that trouble, see. You can keep that in your heart and take your buttons off. They could never take that out of your heart if you wanted to go into another union". (R.I, 73; R.I, 310-312).

August 17, 1945: The five stewards and four committeemen request and are denied reinstatement. (R.I, 73; R.I, 266-267, 289-290; R.II, 341-342, 380-381, 427, R.III, 679-680, 699-700).

August 30, 1945: C.I.O. official demands Petitioner discharge about 70 employees (R.I, 73-74; R.III, 728-731). Petitioner's Labor Relations Director replies "• • • this thing has gone too far. You are getting

too many people involved here * * *" and refuses to comply. (R.I, 74; R.III, 730).

August 31, 1945: C.I.O. requests the discharge of six employees and the Petitioner complied with the request. (R.I, 46; R.III, 806-807, R.II, 654-656). All of these employees had joined the A.F.L., worn A.F.L. buttons in the plant and had taken an active role in the A.F.L. organization. (R.II, 656-657, 506-507). The discharges were effected pursuant to a check of the union dues books of all employees (R.I, 46; R.III, 681, 682, 709-716), but it was stipulated that the C.I.O. did not request their discharge on the ground of non-payment of dues. (R.II, 518).

September 1, 1945: C.I.O. requests and obtains the discharge of eighteen employees. (R.I, 74, 46-47; R.III, 806-807; R.II, 654-656). Petitioner assembled the discharged employees and the employees were informed by Petitioner's Labor Relations Director "If you had kept this quiet about the A.F.L. this wouldn't have happened to you" (R.I, 316), and that "If we (discharged employees) didn't wear A.F.L. buttons and didn't talk too much, why, we wouldn't get in this trouble in the first place" (R.II, 577) and that "We talked too much, that if we had kept our mouths shut we wouldn't have got into this mess". (R.II, 488-489).

September 5, 1945: One more employee, active on behalf of the A.F.L., is discharged pursuant to a request by the C.I.O. (R.I, 51-52; R.II, 631-635).

September 7, 1945: Two more employees, active on behalf of the A.F.L., are discharged pursuant to a request by the C.I.O. (R.I, 50; R.III, 806-807; R.II, 654-656).

September 11, 1945: One employee, working as a machinist under A.F.L. jurisdiction, active on behalf of the A.F.L., is discharged. This particular employee was notified by the Labor Relations Director that he, alone, was required to join the C.I.O. He applied for transfer to the C.I.O. but was refused admission. Other machinists were allowed to continue work without joining the C.I.O. (R.I, 50 and n. 20, 52; R.II, 641-642, 645-646; R.III, 806-807).

In addition to the events of the above particularized dates which cumulatively demonstrate a calculated campaign to eliminate the leadership of a rival organization in advance of an election, the record is replete with indications and direct evidence that the campaign in the plant during the above period was characterized by considerable intensity and bitterness. (R.I, 72, 41; R.I, 299-301, 305-314; R.II, 387-388, 391-394, 411-414, 433-436, 475-478, 481-488, 580, 583-584, 592-594, 631-632). The C.I.O. pointedly reminded the employees by bulletins and oral threats that allegiance to the A.F.L. was tantamount to a tacit request for discharge. (R.I, 72, 77, 43-44; R.I, 299-300, 305-314; R.II, 438-439, 475, 481-488, 516, 564, 580-581, 592-594, 608-609, 631-632, R.III, 785, 789-790). During this period Superintendent Altman and the Labor Relations Director were making daily tours of the plant. (R.I, 180-182, R.III, 696-697, 757-758). During the course of the campaign, the Labor Relations Director received the union papers. (R. III, 759-760). It was the practice of the Superintendent

(R.III, 686-687) and the Labor Relations Director (R.III, 759) to scrutinize the bulletin boards.

On January 13, 1949, the Court of Appeals affirmed the decision of the Board (R.IV, 990-992) and its findings: (a) that the C.I.O. sought to use the closed-shop contract for the purpose of punishing the insurgents, and (b) that Colgate acceded to its discharge-demands notwithstanding Colgate knew that the union had suspended the men in reprisal for their activities in favor of the rival union. The Court succinctly stated, "The evidence abundantly supports these findings".

Intervenors oppose the petition for certiorari in the instant proceeding upon the following grounds:

(1) Approval of the Rutland Court doctrine is implicit in the decision of this Court in Wallace Corp. v. N.L.R.B., 323 U.S. 251, 89 L. Ed. 216.

(2) Intervening legislation has obviated the necessity of eliminating the conflict of decision among the circuit courts concerning the propriety of the Rutland Court doctrine; the question is only of historical interest.

(3) The other grounds for certiorari asserted by petitioner are without merit.

APPROVAL OF THE RUTLAND COURT DOCTRINE IS IMPLICIT IN THE DECISION OF THIS COURT IN WALLACE CORPORATION v. NLRB.

The principal ground for the petition is a quest to review approval by the Circuit Court of the *Rutland Court* doctrine (*Matter of Rutland Court Owners*, 44 N.L.R.B.

587; 46 N.L.R.B. 1040) and application of the doctrine to the instant case.

Simply stated by the Board, the Rutland Court doctrine denominates as an unfair labor practice the discharge of an employee under a union or closed shop contract when the Board finds that the employer has knowledge that the contracting union desired the discharge because of the activities of the employee on behalf of a rival union during a period when it is appropriate to seek a redetermination of representatives.

In *Wallace Corporation v. N.L.R.B.* 323 U.S. 248, 89 L. Ed. 216, this Court expressly affirmed the power of the Board to denominate as an unfair labor practice the discharge of certain employees pursuant to a closed shop contract when the employer had knowledge that the incumbent union's request for discharge were based on the employees' advocacy of a rival union during prior representation proceedings. In language directly applicable to the instant proceeding, Justice Black, speaking for the majority, stated:

> "We do not construe the provision authorizing a closed shop contract as indicating an intention on the part of Congress to authorize a majority of workers and a company, as in the instant case, to penalize minority groups of workers by depriving them of that full freedom of association and self-organization which it was the prime purpose of the Act to protect for all workers. It was as much of a deprivation of the rights of these minority employees for the company discriminatorily to discharge them in collaboration with Independent as it would have been had the company done it alone."

Indeed, in the instant case there is strong evidence to indicate that the company effected the discharges at a time when the incumbent union was facing the likelihood of repudiation at the polls.[2] If it is wrong for a company to assist a union, triumphant at the polls, in ridding itself of dissidents, *a fortiori* it is wrong, in a pre-election campaign, to assist the incumbent in the ruthless elimination of a mass of employees who, in the exercise of their privilege of freedom of association, are honestly seeking, at a proper time, a change of representatives. To hold otherwise would be tantamount to a denial of any privilege of employees, at any time, to challenge effectively the majority status of the incumbent union.

II.

INTERVENING LEGISLATION HAS OBVIATED THE NECESSITY OF ELIMINATING THE CONFLICT OF DECISION AMONG THE CIRCUIT COURTS CONCERNING THE PROPRIETY OF THE RUTLAND COURT DOCTRINE; THE QUESTION IS ONLY OF HISTORICAL INTEREST.

It is true, as Petitioner has urged,[3] that the Circuit Courts have differed upon the propriety of the *Rutland Court* doctrine. The Ninth Circuit has endorsed the doctrine in the instant case and in *Local No. 2880 v. N.L.R.B.*, 158 Fed. (2nd) 365. The Second Circuit has also approved the doctrine in *N.L.R.B. v. American White Cross Laboratories*, 167 Fed. (2nd) 75. The Seventh Circuit is alone

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[2] After the discharge of five plant stewards active in organization against the incumbent union *a majority of the employees* left the plant in protest (R.I, 71, 38; R.I, 257).

[3] Petition of Colgate-Palmolive-Peet Co., page 25.

in repudiating the Board's policy. *Aluminum Company of America v. N.L.R.B.*, 159 Fed. (2nd) 253. *Louis Meier Co. v. N.L.R.B.*, 21 L.R.R.M. 2093.

Whatever importance attached to the necessity of uniformity of decision in the Circuit Courts upon the *Rutland Court* doctrine has been rendered academic by the subsequent amendment of the National Labor Relations Act (Sections 8 (a) (3) (A) and (B), 8 (b) (2), and 10 (c)). Both the instant case and the Seventh Circuit decision involved the interpretation of the Act prior to amendment. Counsel for Intervenors respectfully submit that, if its interpretation of the *Wallace Corporation* case is correct, there is no necessity for this Court to assume jurisdiction of the instant case in order to cope with a spectre of dead law. Congress has effectively embodied and endorsed the *Rutland Court* doctrine in existing labor legislation. Indeed, both proponents and opponents of the Taft-Hartley amendments spoke with approval of the *Rutland Court* decision.[4]

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[4] "Legislative History of the Labor Management Relations Act of 1947", Volumes I and II, U. S. Government Printing Office (1948), Vol. I, p. 428 (Senate Report No. 105 on S. 1126), Vol. II, p. 937 (Extension of Remarks of Hon. James E. Murray), pp. 952-953 (Memorandum of Hon. Wayne Morse).

III.

THE OTHER GROUNDS FOR CERTIORARI ASSERTED BY PETITIONER ARE WITHOUT MERIT.

A. The contention that the decision of this Court in the Wallace case merely precluded discriminatory enforcement of a closed shop agreement when such agreement was executed with a company dominated union is without merit.

Petitioner has urged that this Court's decision in the *Wallace* case applies "solely to the unfair labor practices of an employer committed through the medium of a dominated or company union".[5]

This conclusion is reached by stressing the words "medium of a 'union of its own creation'" appearing in a paragraph of the decision clearly designed to indicate that the company could not accomplish by indirection that which it could not do directly.

The contention completely overlooks the fact that the Board had adopted the principle of refusing to inquire into charges of company domination after a settlement, unless there had been a subsequent unfair labor practice. The Board found there had been a subsequent unfair labor practice in the discharge of the C.I.O. adherents.

As stated by one commentator:

> "Despite the uncertainty as to the scope of the decision brought about by the use of the words "union of its own creation" it is probably safe to assume that the learned Justice and those who concurred in his opinion would sustain the Board's view that it made no difference whether the union at whose behest

[5]Petition of Colgate-Palmolive-Peet Co., pages 25-26, 49-52.

the employer acted was or was not company-dominated or assisted."

E. Merrick Dodd, "The Supreme Court and Organized Labor, 1941-1945", 48 *Harvard Law Review* 1018 at p. 1039 (1945).

B. The contention that the decision of the Court of Appeals establishes a precedent which will permit recalcitrant union members to disrupt and unsettle contracts is without merit.

The contention has been advanced that the decision gives "tacit approval to the proposition that employees may refuse to maintain membership in a union, though this be required as a condition of employment".[6]

This contention is directly contrary to the findings of fact by the Board. As the Board concluded:

> "As for the complainants' withdrawal from the C.I.O., which would ordinarily entitle the (employer) to discharge them in view of the closed shop contract, it will be observed that the C.I.O. did not accept their withdrawals nor is there any evidence that the (employer) discharged them or rejected the reinstatement application of the stewards and the committeemen for that reason. On the contrary, the (employer's) answer and evidence show beyond dispute that the (employer) acted because of the complainants' suspension by the C.I.O. pending determination of charges of anti-C.I.O. activity, and that the attempted withdrawals played no part therein." R.I, 78, n. 8.

Pursuing this train of thought, the petitioner then speculates that the decision may impair "the right of labor unions to secure the discharge of a union member, while

[6]Petition of Colgate-Palmolive-Peet Co., pages 27-28, 52-56.

he remains a union member, except in the single instance where the discharge is sought to discourage or encourage membership in a labor organization".[7]

It is sufficient to say that the instant case does not involve such an issue; it has not been mentioned by the Board, it was not mentioned by the Circuit Court. The present case simply involves discharges sought to discourage membership or advocacy of a rival labor organization. To ask this Court to grant certiorari in order to engage in an abstract discussion of issues not involved in the proceeding is, indeed, a novel and unsound suggestion.

C. The contention that the order and decision affirmed by the Court of Appeals defeats the purpose of the National Labor Relations Act and will not effectuate its policies is without merit.

Petitioner also advances the contention that, since the employees participated in an unauthorized strike, it would not effectuate the purposes of the Act to affirm the decision and order.[8]

Apart from the well-recognized principle recognizing that the Board is invested with discretion in determining the media best designed to effectuate the purposes of the Act, the Petitioner also overlooks the very obvious facts:

(1) that a portion of the discharges preceded the unauthorized work stoppage.

(2) that the employer and the union, at all times, had it within their power to terminate the stoppage by cessation of the unfair labor practices.

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[7]Petition of Colgate-Palmolive-Peet Co., page 54.
[8]Petition of Colgate-Palmolive-Peet Co., pages 56-58.

(3) that the employees had no other effective weapon to halt attrition of their ranks. Certainly, it was an unauthorized strike. Its very purpose was to protest against the practices of the employer and the incumbent union.

(4) that the Board, in its analysis of the facts, determined that participation in the work stoppage was not the moving cause of the discharges.

D. The contention that the Court of Appeals failed to review the instant case in accordance with standards promulgated in the Administrative Procedure Act and the Labor Management Relations Act is without merit.

Petitioner also asserts the Court of Appeals failed to review the record as a whole.[9] Since there is nothing beyond surmise to support this contention, counsel submit the ground so advanced is not worthy of consideration.

In regard to the asserted failure to decide all relevant questions of law, the Administrative Procedure Act makes it incumbent upon the Court only to decide all relevant questions of law "so far as necessary to decision".[10] Counsel submit that, in view of the previous explicit holdings of the Court of Appeals, there was no necessity for it to encumber its decision in the instant case with dicta upon legal issues unnecessary to decision.

E. The contention that the Court of Appeals erred in sustaining the findings of fact of the Board is without merit.

The final contention made by Petitioner is that the Court of Appeals erred in affirming the findings of the

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[9] Petition of Colgate-Palmolive-Peet Co., pages 29, 58-61.
[10] 5 U.S.C.A. 1009(e).

Board with respect to the Petitioner's knowledge of the C.I.O.'s motive in requesting the discharges.[11] More particularly, the Petitioner has dissected from the Record one minute aspect of the factual setting and asserts that since inference was substituted for available direct testimony on this fragment of the case, the entire Record should be reappraised. The summary of testimony previously set forth, *supra*, pp. 5 to 12, indicates that this particular fragment of the case was not decisive in the findings of the Board that the employer had knowledge of the C.I.O.'s discriminatory purpose in demanding discharge of the stewards.

Similarly, the Petitioner contends that, since the union may have had other grounds for requesting the discharge, the Board erred in placing the duty upon the employer to evaluate the evidence and determine whether the C.I.O. was primarily acting in reprisal against the anti-C.I.O. activities of the employees in requesting the discharges.

Of course, this is not the issue. The question before the Board and before the Court of Appeals was whether the employer had knowledge that the impelling motivation of the C.I.O. in requesting the discharges was a desire to stifle the free expression of the employees. This is a question of sheer fact which the Board and the Court of Appeals found against the employer. Since this finding is supported by substantial evidence upon the Record considered as a whole, the choice of language employed by the Board to dispose of the employer's contention that he could rely upon the possible existence of other reasons for

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[11]Petition of Colgate-Palmolive-Peet Co., pages 29-30, 61-63.

the union's requests for discharges, in the face of the obvious and known reason, is manifestly an insufficient ground for granting certiorari to review the entire proceeding.

Wherefore, for the reasons above set forth, it is respectfully submitted that the petitions for writ of certiorari in the instant proceeding should be denied.

Dated, San Francisco, California,
May 2, 1949.

MATHEW O. TOBRINER,
Counsel for Respondent
(Intervenor Below).

(Appendix "A" Follows.)

Appendix "A"

29 U.S.C.A. 157 (National Labor Relations Act):

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

29 U.S.C.A. 158 (National Labor Relations Act):

"It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

(2) • • • ;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in sections 151-166 of this title or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 159 (a), in the appropriate collective bargaining unit covered by such agreement when made."

29 U.S.C.A. 159 (a) (National Labor Relations Act):

"Representatives designated or selected for the purpose of collective bargaining by the majority of

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer."

29 U.S.C.A. 159 (c) (National Labor Relations Act):

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 160 of this title or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

29 U.S.C.A. 160 (c) (National Labor Relations Act):

"The testimony taken by such member, agent or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will

effectuate the policies of this chapter. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint."

29 U.S.C.A. 157 (Labor Management Relations Act):

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

29 U.S.C.A. 158 (Labor Management Relations Act, 1947):

"(a) It shall be unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) * * * ;

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this

sub-chapter or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 158 (a) of this title as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; * * *: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (a) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms ad conditions generally applicable to other members, or (b) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

29 U.S.C.A. 160 (f) (Labor Management Relations Act, 1947):

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written peti-

tion praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

5 U.S.C.A. 1009 (e) (Administrative Procedure Act):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) un-

supported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."